No. 85-2079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, *et al.*,
Petitioners,

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MORTON H. ORENSTEIN
MARK S. ROSS
(Counsel of Record)
LISA S. SPANN

Schachter, Kristoff, Ross,
Sprague & Curiale
101 California Street
Suite 2900
San Francisco, California 94111
(415) 391-3333

Attorneys for Respondent
ADVANCED LIGHTWEIGHT
CONCRETE CO., INC.

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QUESTION PRESENTED

Whether federal courts have subject-matter jurisdiction over an action to collect trust fund contributions allegedly accrued after the expiration of the collective bargaining agreement which created the obligation to make contributions.

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ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR ADVANCED LIGHTWEIGHT CONCRETE CO., INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 779 F.2d 497. The Court of Appeals' Order denying Petitioners' petition for rehearing and rejecting Petitioners' suggestion for rehearing *en banc* (Pet. App. C) was filed on March 18, 1986. The Order of the United States District Court for the Northern District of California granting summary judgment (Pet. App. B) was filed on July 30, 1984, and entered on July 31, 1984. The District Court's Order is not

JURISDICTION

Respondent accepts Petitioner's statement of the Court's jurisdiction.

STATUTES INVOLVED

Respondent accepts Petitioner's statement of the statutes involved. However, Respondent also supplements that statement with Section 8(b)(3) of the National Labor Relations Act, which is reproduced at Appendix A, *infra*.

STATEMENT

Prior to June 15, 1983, Advanced Lightweight Concrete Co., Inc. ("the Company") was party to multiemployer collective bargaining agreements with the Laborers Union and the Cement Masons Union ("the Unions"). Pursuant to these contracts, the Company made monthly contributions on behalf of its employees to the Laborers Trust Funds and the Cement Masons Trust Funds ("the Trust Funds"). The Trust Funds are multiemployer pension plans within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").

On April 1, 1983, the Company offered to meet and bargain for a new contract with the Unions as an individual employer. The Company also notified the Unions that it would not be bound by the multiemployer collective bargaining agreements after their expiration date of June 15, 1983. Neither of the Unions made any attempt to commence negotiations

[1] The manner and extent to which the Unions availed themsleves of the Company's bargaining invitation is in dispute. While the Trust Funds claim that no bargaining impasse was reached, the Company asserts the existence of a bargaining impasse. Alternatively, the Company contends that the Unions did not assert their bargaining rights in a timely fashion or did not meet their bargaining obligations under Sections 8(b)(3) and (d) of the National Labor Relations Act, which in either event privileged the Company to unilaterally cease contributions, notwithstanding the alleged absence of a bargaining impasse.

On June 15, 1983, the old multiemployer collective bargaining agreements expired without new agreements to take their place. Accordingly, as of mid-June 1983, there existed *no contracts* obliging the Company to continue contributions and the Company ceased making contributions to the Trust Funds.

Beginning in December 1983, the Trust Funds filed a series of suits against the Company for the post-June 15 contributions. In each of these cases the Trust Funds claimed that the Company's actions violated Section 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1145. Jurisdiction was asserted under Section 502 of ERISA, 29 U.S.C. § 1132, and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. The Company denied that it was obligated to make contributions after June 15, 1983 and denied that the district court had subject matter jurisdiction. Without reaching the first of these issues, the district court granted the Company's motion for summary judgment based upon the exclusive jurisdiction of the National Labor Relations Board ("NLRB") and the Ninth Circuit's decision in *Cement Masons Health And Welfare Trust Fund* v. *Kirkwood-Bly, Inc.*, 520 F.Supp. 942 (N.D.Cal. 1981), *aff'd*, 629 F.2d 641 (9th Cir. 1982).

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision because the Company's obligation to continue contributions (and its alleged violation of ERISA) derived solely from a possible violation of Section 8(a)(5) of the National Labor Relations Act ("NLRA") falling within the exclusive jurisdiction of the NLRB.

SUMMARY OF ARGUMENT

As correctly found by the Ninth Circuit and every other circuit to address the issue, nothing in ERISA, and more specifically nothing in ERISA Section 515, requires an employer to continue trust fund contributions after the expiration of the contract which contains the employer's promise to make such contributions. That obligation, if any, derives solely from the employer's statutory duty to bargain under Sections 8(a)(5) and (d) of the NLRA. Violations of Sections 8(a)(5) and (d) are unfair labor practices falling within the exclusive jurisdiction of the NLRB.

REASONS FOR DENYING THE WRIT.

1. THE NINTH CIRCUIT'S DECISION COMPORTS WITH THE PURPOSES AND POLICIES OF ERISA, AND DOES NOT RAISE NOVEL ISSUES REQUIRING THIS COURT'S REVIEW.

The Trust Funds misstate the effect that the Ninth Circuit's decision will have on trust funds and trustees under ERISA. Contrary to the Trust Funds' assertions, this case does not involve a tension between ERISA and the NLRA. ERISA does *not* require an employer to establish a plan nor to continue a plan indefinitely. Rather, ERISA is primarily concerned with the elements of a plan and its administration *after* it is established by the employer in order to ensure that the worker who is promised a benefit receives that benefit. *NLRB* v. *AMAX Coal Co.*, 453 U.S. 322, 336 (1981) (trustees cannot require employer contributions not required by the original collective bargaining agreement). *See also, Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981); *Viggiano* v. *Shenango China Division of Anchor Hocking Corporation*, 750 F.2d 276, 279 (3rd Cir. 1984). Accordingly, unlike the NLRA, nothing in ERISA compels an employer to continue contributions once the agreement containing the employer's promise to contribute expires.

Section 515 of ERISA—the linchpin for all of the Trust Funds' arguments—does not alter this result. Section 515 provides that:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collective bargaining agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Congress enacted this Section for a very specific purpose. The Senate Committee on Labor and Human Resources explained that the provision was added to ERISA because "simple collection actions brought by Plan trustees have been converted

into lengthy, costly and complex litigation concerning claims and defenses *unrelated to the employer's promise* and the plan's entitlement to the contributions" and because steps had to be taken to "simplify delinquency collection."[2]

Section 515's plain wording and its legislative history show that it was enacted for the sole purpose of precluding an employer from asserting legal defenses unrelated or extraneous to its promise to contribute in suits to recover delinquent contributions. It was not, however, intended to be a substitute for that promise or to create a new and independent obligation to continue contributions after the expiration of the promise initially giving rise to the obligation.[3] For that reason, every court of appeals to address the issue has held that an employer's failure to maintain the status quo with respect to contribu-

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[2] Senate Committee on Labor and Human Resources, S 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d. Sess., 44 (Comm Print, Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). *See also, Kaiser Steel Corporation* v. *Mullins*, 455 U.S. 72, 87 (1982).

[3] In an effort to avoid 515's plain wording and legislative intent, the Trust Funds argue that the Company's obligation to make contributions under Section 515 must be defined by Section 4212(a) of ERISA, 29 U.S.C. § 1392. However, Section 4212(a) specifically provides that its definition of an employer's obligation to contribute applies *only* for the limited purpose of determining *withdrawal liability* under ERISA. Accordingly, Section 4212(a) has absolutely no application to the instant case which concerns only alleged delinquencies and not employer withdrawal. *See, Moldovan* v. *Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894, 900-01 (3rd Cir. 1986), citing with approval the reasoning and language in *Mo-Kan Teamsters Pension Fund* v. *Botsford Ready Mix Co.*, 605 F.Supp. 1441, 1445 (W.D. Mo. 1985):

> It is clear from the definitions given in the part relating to employer withdrawal that Congress was well aware that an obligation to contribute could arise under agreements made by the parties or arise under duties imposed by labor-management relation law. Congress chose to include both types of obligations in determining withdrawal liability, but chose to create a cause of action and provide special damages for recovery of delinquent contributions only if those contributions were due under an agreement entered into by the employer.
>
> It is because of the clarity of the definition in Title IV [Withdrawal Liability] that plaintiff's argument differentiating between obligations under the terms of a contract and obligations under the contract itself must fail. The Court does not accept the argument that Congress would use an ambiguous, metaphysical concept to define an obligation when it has used a crystal clear definition elsewhere in the same act. . . .

tions after termination of a collective bargaining agreement does not violate Section 515 or any other section of ERISA. *Moldovan* v. *Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3rd Cir. 1986); *U.A. 198 Health & Welfare Education & Pension Funds* v. *Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Office and Professional Employees Insurance Trust Fund* v. *Laborers Funds Administrative Office*, 783 F.2d 919 (9th Cir. 1986). *See also, Pattern Makers' Pension Trust Fund* v. *Badger Pattern Works, Inc.*, 615 F.Supp. 792 (N.D. Ill. 1985); *Mo-Kan Teamsters Pension Fund* v. *Botsford Ready Mix Co.*, 605 F.Supp. 1441 (W.D.Mo. 1985).

2. THE TRUST FUNDS' CLAIMS, IF ANY, DERIVE SOLELY FROM THE NATIONAL LABOR RELATIONS ACT AND FALL WITHIN THE EXCLUSIVE JURISDICTION OF THE NLRB.

The Trust Funds' claims depend entirely on the assertion that the Company and Unions did not bargain to impasse before the Company ceased making contributions. (Pet. 3.) These claims derive solely from Sections 8(a)(5) and (d) of the National Labor Relations Act, which impose a statutory bargaining duty after the expiration of a collective bargaining agreement. *See, NLRB* v. *Katz*, 369 U.S. 736 (1962); *Peerless Roofing Co., Ltd.* v. *NLRB*, 641 F.2d 734 (9th Cir. 1981). This Court has long held that such unfair labor practices fall within the special competence and exclusive jurisdiction of the NLRB. *See, San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 86 ("...[O]nly the Board may provide affirmative remedies for unfair labor practices. . . .").

Moreover, the present case poses significant factual and legal issues concerning the parties' bargaining duties under the NLRA which require the Labor Board's determination. Whether or not a bargaining impasse exists and for what purposes is a highly sophisticated and difficult issue which must be determined by the Board:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exist[s].

Taft Broadcasting Co., 163 NLRB 475, 478 (1967).

Further complicating the resolution of this case are the affirmative defenses raised by the Company. The Company contends that the Unions either waived their bargaining rights or failed to bargain in good faith in violation of Sections 8(b)(3) and (d) of the NLRA, and that in either event, the Company was privileged to make unilateral changes regardless of impasse. These defenses pose a number of subtle factual questions, and difficult issues of law on which the NLRB has had little or no occasion to rule.[4]

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[4] The NLRB has found that an employer is free to make unilateral changes where a union waives its rights to bargain. *See, NLRB* v. *Katz*, 369 U.S. at 747-48. "A union cannot charge an employer with refusal to negotiate when it has not made an attempt to bring the employer to the bargaining table." *NLRB* v. *Alva Allen Industries, Inc.*, 369 F.2d 310, 321 (9th Cir. 1966), citing *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939). However, the Board has never determined whether a union's failure to bargain in good faith also privileges unilateral changes in working conditions. Unilateral changes under such circumstances appear justified under Section 8(d) of the NLRA, which defines the duty to bargain as the "performance of the *mutual* obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . ." (Emphasis added.) A union that fails to bargain and to satisfy this mutual obligation cannot later be permitted to complain about the employer's failure to bargain before making unilateral changes in working conditions. Were a union permitted to make such claims, it would benefit from its own failure to meet statutory obligations, thereby undermining the entire collective bargaining process and frustrating the purposes of the Act.

Such fundamental questions of federal labor policy under the National Labor Relations Act must be determined in the first instance by the body statutorily charged with administering the Act, the NLRB.[5]

[5] Despite the Trust Funds' assertions, they would not be prejudiced by resorting to the Board. The Trust Funds, like any other person, have "standing" to take unfair labor practice charges to the Board. 29 U.S.C. § 160(b); 29 C.F.R. § 102.9. As charging parties, the Trust Funds would have every opportunity to participate in the NLRB's unfair labor practice proceedings, to be represented at trial by counsel, to call and examine witnesses, to cross-examine witnesses, and to introduce evidence. 29 C.F.R. §§ 102.35(i) and 102.38. The Trust Funds could also present oral argument and submit post-trial briefs to the administrative law judge and, in the event of an adverse ruling, file exceptions with the Board. 29 C.F.R. § 102.48. Indeed, if dissatisfied with the Board's decision, the Trust Funds could appeal that decision to the Court of Appeals. 29 U.S.C. § 160(f). That these procedures may differ from those available to the Trust Funds in court litigation does not disqualify the NLRB as the appropriate forum for the Trust Funds' claims. These claims allege unfair labor practices which fall within the NLRB's exclusive jurisdiction and which must be remedied in a manner consistent with the comprehensive scheme devised by Congress. To the extent that the Board's exclusive jurisdiction over these claims causes problems for the Trust Funds, those problems are the result of congressional choice and should be addressed not by the Court, but by congressional action. *See, Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 106 (1983).

CONCLUSION

The Ninth Circuit's decision below does not decide a question of federal law which should be settled by the Court. The Court of Appeals' decision comports with the basic tenets of ERISA and the NLRA, and with this Court's decisions interpreting those statutes. The decision is consistent with every other Court of Appeals' decision dealing with this issue. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SCHACHTER, KRISTOFF, ROSS,
SPRAGUE & CURIALE
Morton H. Orenstein
Mark S. Ross
Counsel of Record
Lisa S. Spann
101 California Street
Suite 2900
San Francisco, California 94111
(415) 391-3333

Attorneys for Respondent
ADVANCED LIGHTWEIGHT CONCRETE
CO., INC.

July 1986

APPENDIX A

SUPPLEMENTAL STATUTE

National Labor Relations Act, Section 8(b)(3)

Section 8(b)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(3), provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> . . . .
>
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) [29 U.S.C. § 159(a)].